BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DARRELL L. TAYLOR	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,008,634
WICHITA SOUTHEAST KANSAS TRANSIT	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the July 7, 2004 Award entered by Special Administrative Law Judge (SALJ) Vincent L. Bogart. The Appeals Board (Board) heard oral argument on December 7, 2004.

APPEARANCES

William L. Phalen of Pittsburg, Kansas, appeared for claimant. Janelle Jenkins Foster of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board considered the record and adopts the stipulations listed in the Award.

ISSUES

In his July 7, 2004 Award the SALJ adopted the opinions of Edward J. Prostic, M.D., and James K. Cole, M.D., and averaged the task loss opinions of these two physicians to arrive at a 26.5 percent task loss. The SALJ also found claimant sustained a 39 percent wage loss and awarded claimant a 32.75 percent work disability.

Respondent argues that it offered claimant an accommodated position at a wage of $498.52, which claimant declined. This accommodated job would have paid claimant

only approximately 58 percent of his pre-injury average weekly wage. Nevertheless, respondent contends claimant is not entitled to work disability benefits pursuant to *Foulk*[1] as he failed to make a good faith effort to perform this accommodated work.

Should the Board affirm claimant's entitlement to a work disability award, the respondent maintains that the claimant's task loss should be held to six (6) percent based on the opinion of Dr. Cole, rather than the 47 percent opinion of Dr. Prostic or an average of the two as used by the SALJ. The respondent maintains that, as Dr. Cole was the claimant's treating physician, he was in the best position to observe the claimant's injury, subsequent recovery, and persisting limitations. Furthermore, as Dr. Cole prescribed the claimant's work restrictions based on the result of a functional capacity evaluation and claimant's physical manifestations, the respondent maintains that his opinion on task loss as a result of a fractured coccyx is the most credible.

Claimant argues that the respondent's first offer of an accommodated job would have paid him 44 percent [sic] less than his pre-injury average weekly wage. Therefore, claimant declined that accommodated job and instead attempted to return to his prior work but was unable to do that job. Then respondent refused to provide an accommodated position. Claimant contends that he cannot be imputed a wage from a job that no longer exists and that respondent's initial offer of an accommodated position cannot now be used against the claimant because of his good faith but failed attempt to return to his original job at a comparable wage. Claimant maintains that he is entitled to a 68.8 percent [sic] work disability award based on a 47 percent task loss and a 90 percent wage loss.

The nature and extent of claimant's disability is the only issue before the Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant started working for respondent in November 1993. Respondent was a "less-than-truck-load" trucking company. Claimant's usual truck route was from Parsons, Kansas, to Memphis, Tennessee. This is a nine (9) hour drive to Memphis and an eight (8) hour drive back to Kansas. Claimant occasionally drove from Parsons to Dallas, Texas a six and one-half hour drive there and a nine and one-half hour drive back. Claimant explained that these time differences between going and return trips was due to taking different routes being used for traveling loaded versus unloaded.

On May 9, 2002, claimant was climbing down a ladder from the truck dock when his foot slipped and he fell into the space between the ladder and the wall. Claimant experienced immediate, severe pain in his tail bone and lower back. Claimant reported the injury to his terminal manager, Eric Thompson. At the January 21, 2004 regular hearing claimant testified he continues to have constant pain in his tail bone and low back and the

[1] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 877 P.2d 140 (1994).

pain worsens with prolonged sitting. Claimant also testified that bending and twisting at the waist bothers him. If he sits very long, "the backs of his legs kind of get cramps in them and I have to push away from the desk or stand up . . . for a few minutes.[2]

Claimant first sought medical care at the Labette County Medical Center emergency room the same day as his accident. The emergency room doctor reviewed x-rays and gave claimant medication. Essentially, no more treatment was provided by the emergency room doctor. Thereafter, claimant sought treatment with the company doctor, Earl Cornell, M.D.

Claimant testified that Dr. Cornell told him that time "would probably heal that."[3] And claimant was then referred to Kevin Komes a physiatrist in Pittsburg, Kansas. Dr. Komes informed claimant that he does not treat those types of injuries and he referred claimant to Dr. Lieurance at Midwest Orthopaedic in Joplin, Missouri.

Claimant first saw Robert K. Lieurance, M.D., on July 1, 2002. Dr. Lieurance is an orthopedic surgeon in practice with the Midwest Orthopaedic Surgery, Inc., group in Joplin, Missouri. He diagnosed claimant with a fractured tail bone and likewise believed that time would heal it. However, the radiologist recommended a bone scan for further evaluation and noted that if the bone scan indicates a coccyx fracture, claimant "will more than likely require a lengthier time of work limitations that don't require such extended and firm seating conditions as a truck driver would encounter."[4] Claimant was placed on medication and provided work restrictions of no sitting greater than two hours and it was recommended he follow up after the bone scan.

Claimant's bone scan of July 9, 2002 revealed:

1. Suspect a lumbar radiculitis, possibly a sciatica.
2. Coccydynia secondary to his contusion.[5]

Claimant was seen again on July 26, 2002 by Dr. Lieurance for followup. At that time claimant reported no decrease in his pain symptoms and an MRI of his lumbar spine was scheduled. Dr. Lieurance's assessment was coccydynia due to claimant's contusion and lumbar radiculitis. Dr. Lieurance wanted to rule out a lumbar spine compressive neuropathy. Claimant was referred to Dr. Cole, another spine surgeon associated with the Midwest Orthopaedics Surgery, Inc., group.

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[2] R.H. Trans. at 28.

[3] *Id.* at 15.

[4] Cole Depo. Cl. Ex. 2.

[5] *Id.*

Claimant first saw James K. Cole, M.D. on August 6, 2002. Dr. Cole is board certified in orthopedic surgery. He obtained a history from claimant, reviewed x-rays and performed a physical. He diagnosed claimant with coccygodynia. Claimant's medical history form at this office visit revealed claimant had complaints of sharp pain and numbness in the tail bone area. Claimant reported always having extreme pain after prolonged sitting and moderate pain with prolonged walking. He reported numbness in his thighs and lower back and a sharp stick feeling in his tail bone area. Dr. Cole said surgery was available but at that point he did not recommend it. Dr. Cole's assessment was comminuted coccygeal fracture. Dr. Cole treated claimant with medications, allowed him six to nine months more to get better, to use a coccyx cushion, and to sit as tolerated.

Claimant saw Dr. Cole next on September 19, 2002. At this point it had been four and one half months out from the coccygeal fracture. Claimant reported he was doing fairly well but believed the wet weather caused his coccygeal pain to increase. Dr. Cole's assessment on that day was coccydynia secondary to fracture. Dr. Cole recommended claimant wait for another two months before he starts considering injections. He also recommended claimant start looking for another job that did not require him to sit. Dr. Cole scheduled claimant for followup in November.

Claimant saw Dr. Cole again on November 7, 2002. Claimant at this point was six months out from his work-related injury. Dr. Cole assessed claimant with coccygeal fracture and believed claimant to be at maximum medical improvement. Claimant was doing light duty work and Dr. Cole recommended he continue doing that. He recommended a functional capacity evaluation to determine if claimant's range of motion had been affected by the injury. Dr. Cole wanted to wait and get the functional capacity evaluation to determine claimant's final work recommendations and restrictions.

It should be noted that claimant's functional capacity evaluation recommended that:

> At this point, the client demonstrates a functional activity level which is satisfactory for a variety of positions but does not include his normal job position which includes prolonged sitting vibration. It appears that he could possibly benefit from a course of supervised treatment incorporating strengthening and trunk stabilization activities as well as some general conditioning. This could be achieved through a work conditioning program"[6]

Dr. Cole testified claimant never received such treatment.[7]

Claimant was seen again by Dr. Cole on December 13, 2002, to evaluate the functional capacity evaluation completed by claimant. Dr. Cole testified he believed

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[6] Cole Depo. at Ex. 3.

[7] Cole Depo. at 16.

claimant to have a functional impairment of five (5) percent whole person based upon the DRE lumbar category II of the *Guides.*[8] At that time Dr. Cole did not impose any permanent restrictions based on claimant's functional capacity evaluation. However, Dr. Cole did see claimant one last time in January 2003.

Originally, Dr. Cole did not place sitting restrictions on claimant. However, after claimant attempted to return to work in January 2003 and he could not sit long enough to drive the truck, he returned to Dr. Cole and requested sitting restrictions.[9] Dr. Cole gave claimant restrictions of light work duty with no sitting more than two (2) hours with standing limited to 30-45 minutes. Dr. Cole at that point did not believe claimant could drive a tractor-trailer rig to Dallas. Dr. Cole went on to say he recommended time and Motrin and recommended followup in three months.

At the time claimant was seen by Dr. Cole on January 17, 2003, Dr. Cole found claimant continued to have sharp pain over the coccyx to palpation. Claimant reported after driving one trip he was comfortable sitting for a total of three (3) hours but after that, he started having irritation and he is still taking more than a week to get over that pain. Upon examination claimant was tender at the S5-C0 junction to palpation. His pain was sharp and that is what causes claimant's discomfort. He diagnosed claimant again with coccygodynia, seven or eight months in duration. Dr. Cole stated he still did not advocate for any other type of intervention at that point. Although he usually likes to wait at least a year post-accident, Dr. Cole nevertheless recommended permanent restrictions of no sitting continuously for more than three (3) hours.

At his deposition using Monty Longacre's task list Dr. Cole testified there is only one task contraindicated. He was not asked to give a task loss opinion using the task list prepared by Karen Terrill.

Following his return to work by Dr. Cole, respondent offered to hire claimant as a dispatcher at $11.00 an hour. Claimant testified that respondent did not offer to pay him at a level comparable to previous wages. Claimant did not want to make the long trips between his home and Parsons for that lesser amount of money. Claimant testified that when he was an over-the-road truck driver he was on a schedule and went out three (3) times one week, twice the next. Claimant would have been driving twice as much on his commute to work for half the money. Also, in the accommodated job claimant would be making the trip 10 times a week. This had caused claimant to have increased physical

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[8] AMA American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). Initially Dr. Cole rated claimant using the fifth edition of the *Guides* but was asked during testimony by respondent's counsel to convert that figure using the fourth edition. Dr. Cole testified it would be a fracture of the posterior element, DRE Lumbar category no. II that would be a five (5) percent to the whole person based on the [4th ed.] of the book.

[9] R.H. Trans. at 29.

pain when he had done it before. Claimant testified he told respondent this but respondent would not offer him a job within his restrictions at a comparable wage. Therefore, claimant quit his accommodated position on January 13, 2003.

The restriction against sitting for extended periods prevented the claimant from returning to work as a truck driver. Although the claimant was indeed provided an accommodated position as a dispatcher while he was under the care of Drs. Lieurance and Cole, reaching the job site of the accommodated position in Parsons, Kansas from his home in Miami, Oklahoma required a 58 mile drive. In an ironic twist, commuting to and from the accommodated position provided in lieu of his truck driving duties required as much or more driving than his prior assignment would have demanded of him, and his back hurt worse than before.

Respondent offered claimant a permanent position as a dispatcher in December 2002. However, claimant never started the permanent position at $11.00 an hour. He continued to work in the accommodated position with his temporary work restrictions until January 13, 2003 and then quit that job. Claimant did, however, acknowledge the permanent accommodated position he had was within his three (3) hour sitting restrictions. Claimant also acknowledged that after he quit he asked for his job back.[10] When he reapplied for the dispatch job he was not hired nor was he offered a trucking job.[11]

Lester L. Rhodes is the vice president of operations for respondent. On January 7, 2003, claimant was offered a position as a driver trainer/recruiter in Parsons, Kansas. The starting rate of pay offered to claimant was $11.50 per hour. Claimant responded he would have to go home and think about the offer. The next day claimant came back and said he did not want the job.[12]

Mr. Rhodes testified they had been thinking about adding a second driver trainer/recruiter position to the company. When claimant became ill they valued his service as an employee to create the second driver trainer/recruiter position for him. However, when claimant turned it down they did not pursue the hiring of an additional person. Mr. Rhodes believed there were just certain people who could fill that position and he knew claimant had a good relationship with the other drivers.[13]

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[10] R.H. Trans. at 32 and 33.

[11] *Id.* at 37.

[12] Rhodes Depo. at 3-5.

[13] *Id.* at 5-7.

Claimant resigned because he did not want the job as a driver trainer/recruiter. Claimant has never asked Mr. Rhodes for his job back. Mr. Rhodes testified that he does not know if claimant asked anyone else in the company for his job back.[14]

Mr. Rhodes testified he had not seen claimant's letter of resignation which was sent to Ms. Ogle. Mr. Rhodes did recall claimant went back to work driving a truck however, he could not do it and returned with restrictions of no sitting more than three (3) hours.

Marsha Ogle is the director of human resources for respondent. Ms. Ogle was aware Mr. Rhodes had offered claimant a position as a driver trainer/recruiter for respondent on January 7, 2003.[15] The starting rate of pay was $11.50 an hour and it would not have required over-the-road truck driving. Ms. Ogle was aware claimant was released to return to work on December 13, 2002, and that he returned to work driving a truck at that time. Thereafter, respondent received a note from the doctor stating claimant could not drive a truck.[16] Ms. Ogle testified since January 17, 2003, respondent has not offered claimant an accommodated position.[17]

On January 17, 2003, claimant wrote a letter to Ms. Ogle stating that his doctor had restricted him from sitting more than three (3) hours. Claimant requested an accommodated position and stated the reasons he had resigned on January 13, 2003, was because he was in so much pain from his trip that day.[18] Ms. Ogle testified she did not know why the position of the driver trainer/recruiter was not still available to claimant on January 17, 2003.[19]

Claimant was examined by Edward J. Prostic, M.D., on February 17, 2003 at his attorney's request. Dr. Prostic is board certified in orthopedic surgery. He obtained a history, reviewed medical records and performed an examination. Upon examination claimant continued to have complaints of pain across his low back and near his sacrum and coccyx. The pain was worse with sitting, bending, twisting and lifting, as well as sneezing and coughing. Claimant also had aches in both legs which started recently since his attempted return to work. Dr. Prostic's opined that claimant's problems were caused by the work at respondent's and determined the injuries to be permanent. Dr. Prostic

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[14] *Id.* at 8.

[15] Ogle Depo. at 3 and 4.

[16] *Id.* at 15 and 16.

[17] *Id*. at 18 and 19.

[18] *Id.* at 19 and 20; Ogle Depo. Exhibits 3 and 4.

[19] *Id*. at 23.

opined he believed claimant has a ten (10) percent permanent partial impairment of the body as a whole based on the *Guides.*[20] He placed restrictions to avoid prolong sitting, to avoid lifting weights greater than 40 pounds occasionally or 20 pounds frequently. He should avoid frequent bending or twisting at the waist or significant use of vibrating equipment. Using the task list prepared by Karen Terrill, Dr. Prostic testified claimant has a 47 percent task loss.

At the request of claimant's attorney claimant was interviewed on October 21, 2003, by Karen Terrill a vocational expert for the purpose of developing a job task list based on a 15-year work history. Ms. Terrill did not have a wage statement from respondent at the time of the interview to determine claimant's current wage loss. He was mowing lawns earning $300 a week. Comparing this to the $891.52 average weekly wage he was earning at the time of his injury would result in an actual 66 percent loss of wages. However, claimant's lawn mowing work was seasonal and he did not make $300 a week on an annual basis. Claimant testified he grossed $7,000 and netted approximately $5,000 for the year.

At respondent counsel's request claimant met with Monty Longacre, a vocational rehabilitation specialist on February 4, 2004. Mr. Longacre determined claimant has a 44 percent loss of wage earning ability based on the combined restrictions of Drs. Prostic and Komes. Using Dr. Komes restrictions, he believed claimant had lost the ability to perform 7 out of 18 tasks for a 39 percent task loss. Utilizing Dr. Prostic's restrictions Mr. Longacre believed claimant had lost the ability to perform 1 out of 18 tasks for a six (6) percent task loss. However, the restrictions he utilized for Dr. Prostic were incomplete. Using Dr. Prostic's complete restrictions Mr. Longacre believed claimant would be unable to perform six out of the 18 tasks, for a 33 percent loss. Mr. Longacre believed there were jobs in claimant's geographic area that paid between $7.00 and $12.69 per hour that claimant had the ability to perform. However, he acknowledged that his report included jobs that would not be within Dr. Prostic's restrictions as he now understood them to be. Mr. Longacre used a 60 mile radius of claimant's home as the geographic area for his job search. He considered 60 miles to be a reasonable commute.

Because claimant suffered an "unscheduled" injury, the permanent partial general disability rating is determined by the formula set forth in K.S.A. 44-510e, which provides in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was

[20] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

> earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[21] and *Copeland*[22]*.* In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption of having no work disability as contained in K.S.A. 1988 Supp. 44-510e (the above quoted statute's predecessor) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland,* the Kansas Court of Appeals held that for purposes of the wage loss prong of K.S.A. 44-510e, a worker's post-injury wages should be based upon his or her ability rather than actual wages when the worker fails to make a good faith effort to find appropriate employment after recovering from the injury.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.[23]

The Board finds considering that the accommodated job offered would have paid the claimant 42 percent less than what he was making pre-injury, and would have required him to make a daily 120 mile round trip commute, the claimant cannot be faulted for his initial refusal of the accommodated job. Subsequently, after claimant unsuccessfully attempted to return to his regular unaccommodated job, the safety job was not re-offered, nor did the respondent offer claimant any other accommodated job.

Thereafter, the claimant made a good faith job search. Claimant testified he "[p]robably applied at between 60 and 70 different places" in the Miami, Oklahoma area.[24] Claimant has applied at temporary agencies and looked through job services and also looked for work in the Miami newspaper. Claimant has had no offers of work. The only work claimant has done is mowing lawns with a riding lawnmower. His gross earnings from his lawn mowing business are $7,000.[25]

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[21] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 *rev. denied* 257 Kan. 1091 (1995).

[22] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[23] *Id.* at 320.

[24] R. H. Trans. at 23 and 24.

[25] *Id.* at 24.

In principle, the Board will affirm the SALJ's task loss finding, by averaging the two task loss opinions of Drs. Prostic and Cole to arrive at a 26.5 percent task loss. However, based upon an actual post injury net wage of $5,000 per year yielding $96.15 per week versus a preinjury average weekly wage of $891.52, the claimant's current wage loss is equal to approximately 89 percent. This 89 percent wage loss averaged with the 26.5 percent task loss, yields a 58 percent work disability in lieu of the 32.75 percent figure awarded by the SALJ.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of July 7, 2004 entered by Special Administrative Law Judge Vincent L. Bogart should be, and is hereby, modified as follows:

The claimant is entitled to 26.7 weeks of temporary total disability compensation at the rate of $417 per week or $11,133.90 followed by 30.25 weeks of permanent partial disability compensation at the rate of $417 per week or $12,614.25 for a 7.5 percent functional disability followed by permanent partial disability compensation at the rate of $417 per week not to exceed $100,000 for a 58 percent work disability.

As of December 22, 2004 there would be due and owing to the claimant 26.7 weeks of temporary total disability compensation at the rate of $417 per week in the sum of $11,133.90 plus 110.16 weeks of permanent partial disability compensation at the rate of $417 per week in the sum of $45,936.72 for a total due and owing of $57,070.62, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $42,929.38 shall be paid at the rate of $417 per week until fully paid or until further order from the Director.[26]

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

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[26] The proper method to account for the payment of temporary partial disability compensation is to convert the amount of temporary partial paid into a weekly equivalent by dividing the total sum of temporary partial disability benefits paid by the weekly temporary total disability benefit rate. Therefore, the temporary partial disability benefits that respondent paid claimant during the pendency of this claim in the total sum of $3,090.78, represents the equivalent of 7.41 weeks of temporary total disability which was found to be the correct figure to be used in calculating claimant's award. When added to the 19.29 weeks of temporary total disability compensation paid this totals 26.70 weeks. See Brobst v. Brighton Place North and *Church Mutual Insurance Company* and *Kansas Workers Compensation Fund,* Docket Nos. 152,447; 152,448 and 152,449 [Affirmed by Kansas Court of Appeals, 24 Kan. App. 2d 766, 955 P.2d 1315 (1997)].

Dated this ____ day of January 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Janelle Jenkins Foster, Attorney for Respondent and Liberty Mutual Ins. Co.
Vincent L. Bogart, Special Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director